85-266

Supreme Court, U.S.
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No. 85-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILCO MARSH BUGGIES AND DRAGLINES, INC.
JOHN M. WILSON, SR., DEAN R. WILSON,
and ROBERT J. WILSON, JR.,

Petitioners,

v.

KORI CORPORATION, HUEY J. RIVET,
and LOUIS WOODSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

The questions presented are similar to questions presented to this Court in *Smith International, Inc.* v. *Hughes Tool Company*, Petition No. 84-1995.

1. Under the doctrine of law of the case, does a prior interlocutory appellate decision by "necessary inference" decide an issue never briefed, argued, or referenced by either the parties or the court on the prior appeal?

2. Under the doctrine of law of the case, does a prior interlocutory appellate decision by "necessary inference" decide an issue expressly deferred by the appellate court during the prior appeal for consideration during further proceedings?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	14

TABLE OF AUTHORITIES

PAGE

CASES

Besly-Welles Corp. v. *Balax, Inc.*, 291 F. Supp. 328 (E.D. Wis. 1968), *aff'd*, 421 F.2d 809 (7th Cir. 1980) 8

Chase v. *United States*, 261 F. 833 (8th Cir. 1919), *aff'd* 256 U.S. 1 (1921) 10

Connett v. *City of Jerseyville*, 110 F.2d 1015 (7th Cir. 1940) 10

Conway v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981) 9

Dangler v. *Imperial Machine Co.*, 11 F.2d 945 (7th Cir. 1926) 8

Doran v. *Petroleum Management Corp.*, 576 F.2d 91 (5th Cir. 1978) 10

Gertz v. *Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982) 10

Hartford Life Insurance Co. v. *Buncoe*, 255 U.S. 129 (1921) 10

Holmes v. *McDermott*, 682 F.2d 1143 (5th Cir. 1982) 11

Kori Corporation v. *Wilco Marsh Buggies and Draglines, Inc.*, 561 F. Supp. 512 (D.C. LA 1981) 1, 2, 3, 4, 6, 8, 12

Kori Corporation v. *Wilco Marsh Buggies and Draglines, Inc.*, 708 F.2d 151 (5th Cir. 1983) 2, 5, 6, 7, 11, 12

Kori Corporation v. *Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649 (Fed. Cir. 1985) 1, 6, 8

Liberty Mutual Insurance Co. v. *EEOC*, 691 F.2d 438 (9th Cir. 1982) 10

Maggard v. *O'Connell*, 703 F.2d 1284 (D.C. Cir. 1983) 10

PAGE

Mead Johnson & Co. v. *Baby's Formula Service, Inc.*, 402 F.2d 19 (5th Cir. 1968) 3, 8, 11

Messenger v. *Anderson*, 225 U.S. 436 (1912) 9

Paeco, Inc. v. *Applied Moldings, Inc.*, 562 F.2d 870 (3rd Cir. 1977) 12

Peques v. *Morehouse Parish School Board*, 706 F.2d 735 (5th Cir. 1983) 10

Powder Power Tool Corp. v. *Powder Actuated Tool Co.*, 230 F.2d 409 (7th Cir. 1956) 8

Quern v. *Jordan*, 440 U.S. 332 (1979) 9

Saf-Gard Products, Inc. v. *Service Parts, Inc.*, 532 F.2d 1266 (9th Cir. 1976) 12

Schreyer v. *Casco Products Corp.*, 97 F. Supp. 159 (D.C. Conn.), *aff'd as modified on other grounds*, 190 F.2d 921 (2d Cir. 1951) 8

Washington Sportservice, Inc. v. *M.J. Uline Co.*, 313 F.2d 889 (D.C. Cir. 1962) 10

Wisconsin Alumni Research Foundation v. *Vitamin Technologists, Inc.*, 41 F. Supp. 857 (S.D. Cal. 1941), *aff'd*, 146 F.2d 941 (9th Cir. 1945) 8

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 4

28 U.S.C. § 1292 2

28 U.S.C. § 1295 2

28 U.S.C. § 1338 3

28 U.S.C. § 1631 2

28 U.S.C. § 2101(c) 2

35 U.S.C. § 261 2

35 U.S.C. § 283 2

35 U.S.C. § 284 2

35 U.S.C. § 285 2

PAGE

RULES

Fed. R. Civ. P. Rule 52 2

Fed. R. Civ. P. Rule 65(d) 2

OTHER

16 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3928 (1977) 12

18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4478 (1981) 9

Deller's *Walker on Patents*, § 500 (2nd ed. 1965) 8

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JOHN M. WILSON, SR., DEAN R. WILSON,
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Petitioners,

v.

KORI CORPORATION, HUEY J. RIVET,
and LOUIS WOODSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Wilco Marsh Buggies and Draglines, Inc., John M. Wilson, Sr., Dean R. Wilson, and Robert J. Wilson, Jr. respectfully pray that a writ of certiorari issue to review the judgment entered by the Court of Appeals for the Federal Circuit in Appeal No. 84-1143.

OPINIONS BELOW

The decision of the Court of Appeals for the Federal Circuit of which review is sought is reported at 761 F.2d 649. It is set out in the Appendix (A.1-19).[1] It affirmed a final decision entered on August 30, 1982 by the United States District Court for the Eastern District of Louisiana reported at 561 F.Supp. 512, 523-34. (A. 23, 50-72).

[1] All reference to the Appendix will be by use of the letter "A" followed by a page number.

The following opinions in the courts below are also relevant: an unpublished interlocutory decision on a motion entered by the United States District Court for the Eastern District of Louisiana on December 2, 1980 (A.20); an interlocutory decision entered on December 11, 1981 by the same District Court reported at 561 F.Supp. 512, 514-23 (A.23, 24-50); an unpublished interlocutory order issued on October 7, 1982 by the United States Court of Appeals for the Fifth Circuit (A.73); and an affirmance of the District Court's December 11, 1981 interlocutory decision by the Fifth Circuit on June 27, 1983 reported at 708 F.2d 151 (A.74).

JURISDICTION

The judgment of the Federal Circuit is dated and was entered on May 2, 1985. A timely petition for rehearing was denied on July 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES AND RULES INVOLVED

The texts of 28 U.S.C. §§ 1292, 1295, and 1631, 35 U.S.C. §§ 261, 283, 284, and 285, and Rules 52 and 65(d) of the Federal Rules of Civil Procedure are set out in the Appendix. (A.85-93).

STATEMENT OF THE CASE

The focus of the present petition is the Federal Circuit's reliance on the doctrine of law of the case to selectively bar consideration of certain issues. The District Court assessed substantial damages not only against the corporate Defendant, Wilco Marsh Buggies and Draglines, Inc. ("Wilco"), but also against the individual Defendants, John M. Wilson, Sr., Dean R. Wilson and Robert J. Wilson, Jr. (the "Wilsons"). On appeal to the Federal Circuit, the Wilsons argued that they should not be held personally liable for damages. Although no appellate court has decided this issue, the Federal Circuit refused to consider it. Instead, the Federal Circuit, *sua sponte*, determined that the

doctrine of law of the case precluded consideration of the personal liability of the Wilsons. To fully understand what the Federal Circuit did, a brief history of the litigation is necessary.

1980 District Court Decision

On December 2, 1980, the District Court denied a motion to dismiss the individual Defendants, the Wilsons. (A.20). In their motion, the Wilsons argued that they, as corporate officers and directors, were not personally liable for the acts of the Defendant corporation, Wilco. The District Court denied the motion on authority of cases such as *Mead Johnson & Co.* v. *Baby's Formula Service, Inc.*, 402 F.2d 19 (5th Cir. 1968). (A.22). The District Court reasoned that because patent infringement is a type of tort, the individual defendants could be held primarily liable and the corporation secondarily liable under the doctrine of respondeat superior for inducing patent infringement. The motion to dismiss was denied pending further proceedings to determine "to what extent, the Wilsons actively induced the alleged infringement." (A.22).[2]

1981 District Court Decision

On December 11, 1981, the District Court determined that the patent had been infringed and that invalidity of the patent had not been established. (561 F.Supp. 512; A.23). When entering an injunction and concluding that the Plaintiffs would be entitled to an award of damages, costs, and attorney fees, the District Court entered the following conclusions of law:

23.

> Defendants, by actively inducing infringement of the Rivet '785 patent are liable as infringers. 35 U.S.C. § 271(b).

. . . .

---

[2] Because this was a suit for patent infringement, the District Court had original jurisdiction under 28 U.S.C. § 1338.

26.

Having copied these essential parts of the patented amphibious craft, knowing the same to be patented and having no good faith belief that the patent is invalid, defendants are willful infringers.

27.

A belief by defendants of non-infringement or patent invalidity based upon a careless disregard of the facts is not a good faith belief sufficient to negate a conclusion that they have willfully infringed.

(561 F.Supp. at 522; A.48-49) (citations omitted). The District Court did not, however, assess the amount of damages, costs and attorney fees to be awarded to Plaintiffs.

1982 Fifth Circuit Order

On appeal to the Fifth Circuit, appellate jurisdiction was based upon 28 U.S.C. § 1291(a)(4) for review of decisions "in civil actions for patent infringement which are final except for accounting." Wilco and the Wilsons argued that the District Court's determination that they would be liable for attorney fees and willful infringement was in error. No issue concerning personal liability of the Wilsons as individuals for pecuniary damages was raised. The Fifth Circuit, *sua sponte*, questioned whether it had jurisdiction to determine such questions as liability for attorney fees when the amount of attorney fees had not yet been assessed and directed the parties "to address the question of whether under the principles of such cases as *Holmes* v. *McDermott*, 682 F.2d 1143 (5th Cir. 1982), the judgment appealed from is final within the meaning of 28 U.S.C. § 1291(a)(4) given the interlocutory character of the appeal." (A.73).

In response to this directive, Wilco and the Wilsons advised the Fifth Circuit that because an injunction against further infringement had been entered, appellate jurisdiction was proper

under 28 U.S.C. § 1291(a)(1) for review of decisions "granting . . . injunctions . . . ." Further, Wilco advised the Fifth Circuit that only questions of patent validity and infringement should be considered on the appeal and expressly waived review at that time of the issues of liability for attorney fees or willful infringement, expressly preserving their "rights to challenge the validity of those findings relative to attorney's fees and an exceptional case when, as, and if necessary, at such time as may be required in order to preserve defendants rights to question the legal sufficiency of the same."

1983 Fifth Circuit Decision

On June 27, 1983, the Fifth Circuit affirmed the District Court's December 11, 1981 decision holding the patent "valid and infringed by defendants' vehicle." (708 F.2d at 153; A.77) The Fifth Circuit expressly indicated that because the case had been bifurcated at the trial level, "the issue of damages . . . was severed" (708 F.2d at 154; A.79-80) and that "[b]y supplemental briefing Wilco waived, at this time, the attorneys' fees appeal, leaving that issue to be considered with the second phase of the bifurcated trial." (708 F.2d at 154, n. 1; A.80). The Fifth Circuit concluded that "the issues Wilco ultimately urges to this court are properly before us." *Id.*

Regarding the question of infringement, the Fifth Circuit agreed with the District Court that Wilco's machines infringed, but made no reference to any alleged infringement by the Wilsons. In pertinent part, the Fifth Circuit stated:

> The final issue is whether Wilco's marsh buggy infringes the Rivet patent. Wilco suggests a number of modifications which, it is claimed, distinguish Wilco's product from Rivet's patent . . .
>
> We need not belabor the point. Suffice it to say that a comparison of the two craft reveals substantial identity of means, operation and result. The differences are cosmetic and trivial. The essence of both vehicles is the same; each

> relies on the Rivet improvements. Wilco's models infringe the Rivet patent.

(708 F.2d at 156; A.84).

The Fifth Circuit did not discuss the issues of personal liability of the individual Defendants, the Wilsons, for pecuniary or punitive damages or attorney fees.

1982 District Court Decision

During the pendency of the appeal before the Fifth Circuit, the District Court conducted further proceedings on the question of damages. On August 30, 1982, the District Court rendered a decision holding "defendants" liable for pecuniary and punitive damages and attorney fees "in the amount of $1,113,660.11." (561 F.Supp. at 534; A.72). In the course of its opinion, the District Court summarized its 1981 conclusions of law stating that "the devices manufactured by the defendants infringed" and "the defendants, by actively inducing infringement of the Rivet '785 patent, are liable as infringers." (561 F.Supp. at 522; A.48).

1985 Federal Circuit Decision

The Federal Circuit affirmed the District Court's award of damages in all respects. (761 F.2d 649; A.1). Regarding the issue of personal liability of the individual Defendants, the Federal Circuit refused to consider this issue. *Sua sponte*, the Federal Circuit determined that the doctrine of law of the case precluded consideration of the personal liability of the Wilsons. The Federal Circuit, in pertinent part, stated:

> The district court's decision denying Wilco's motion to dismiss [the individual defendants] was part of its original decision on liability. The Fifth Circuit has already affirmed the district court's liability decision in all respects. 708 F.2d at 156, 219 U.S.P.Q. at 289. Issues decided at an earlier stage of litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case. *See* 1 J. Moore, *Federal Practice* ¶ 0.404[1], n. 15 (1984).

(761 F.2d at 657; A.18).

REASONS FOR GRANTING THE WRIT

Like the Petition for Certiorari to the Federal Circuit presently pending before this Court in *Smith International, Inc.* v. *Hughes Tool Company,* Petition No. 84-1995, this petition presents questions of the proper application of the doctrine of law of the case. No questions of technology or of substantive patent law are presented. In *Smith*, the Federal Circuit relied on a single sentence in a 47 page brief to the Ninth Circuit in a section discussing unrelated issues to find a law of the case and refuse consideration of matters never considered or discussed by any court. Here, the Federal Circuit, *sua sponte*, has gone two steps further. First, the Federal Circuit has refused to consider the issue of personal liability of the individual Defendants, the Wilsons, for pecuniary damages. This issue was not briefed, argued, referenced, or in any way addressed by the parties or the court during the prior interlocutory appeal to the Fifth Circuit. Second, the Federal Circuit has refused to consider the issue of personal liability of the Wilsons for attorney fees and punitive damages. These issues were expressly waived by the Wilsons during the prior interlocutory appeal to the Fifth Circuit and expressly and implicitly reserved by the Fifth Circuit for consideration during further proceedings. (708 F.2d at 154, n. 1; A.80).

Clearly, the Federal Circuit has refused to consider matters that could have been, but were not, considered during a prior interlocutory appeal. This is a purpose and policy of *res judicata*, not law of the case. In doing so, the Federal Circuit has acted contrary to the directives of this Court. But more importantly, as a national appellate court, the Federal Circuit has mandated that incorrect principles of federal procedure be followed by each of the 507 district judges who, in part, owe fealty to the Federal Circuit. This petition, as well as the petition in *Smith*, should be granted to correct the erroneous national precedents now set by the Federal Circuit — a court composed

primarily of judges experienced in administrative procedures from their prior tenure with the Court of Customs and Patent Appeals and Appellate Division of the Court of Claims, but having little experience guiding the workings of Article III courts.

An issue of national importance and of monumental practical importance for all corporate officers and directors is whether they can be held personally and jointly liable for patent infringement with an infringing corporation during the routine performance of their corporate duties. There is a split of decision between the circuit courts of appeals. Compare *Mead Johnson & Co.* v. *Baby's Formula Service, Inc.*, 402 F.2d 19, 23 (5th Cir. 1968) with *Dangler* v. *Imperial Machine Co.*, 11 F.2d 945, 946-47 (7th Cir. 1926).[3] The Federal Circuit has not yet resolved this conflict in the patent law. The Wilsons, the individual Defendants, have a right to have the question of their personal liability for damages determined by an appellate court. The Federal Circuit, *sua sponte*, has refused to do so. (761 F.2d at 657; A.18). The appropriate motion to dismiss the individual Defendants was made to the District Court. Following the *Mead Johnson* lines of cases, the District Court denied the motion to dismiss the individual Defendants in December of 1980 (A.20) and reaffirmed the liability of the individual Defendants in its first published interlocutory decision of December 11, 1981 (561 F.Supp. at 512; A.23) and in its final decision of August 30, 1982 (561 F.Supp. at 523; A.50).

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[3] Other cases following the *Dangler* line of reasoning include: *Powder Power Tool Corp.* v. *Powder Actuated Tool Co.*, 230 F.2d 409, 414 (7th Cir. 1956); *Besly-Welles Corp.* v. *Balax, Inc.*, 291 F. Supp. 328, (E.D. Wis. 1968), *aff'd* 421 F.2d 809, 821 (7th Cir. 1980); *Schreyer* v. *Casco Products Corp.*, 97 F. Supp. 159 (D.C. Conn.), *aff'd as modified on other grounds*, 190 F.2d 921 (2d Cir. 1951); *Wisconsin Alumni Research Foundation* v. *Vitamin Technologists, Inc.*,41 F. Supp. 857 (S.D. Cal. 1941), *aff'd*, 146 F.2d 941 (9th Cir.). *See* Deller's *Walker on Patents*, § 500 (2d Ed. 1965).

Although a first interlocutory appeal was taken to the Fifth Circuit from the District Court's December 11, 1981 decision, the only questions ultimately presented and reviewed were questions of patent validity over certain known technology and patent infringement by certain of Wilco's devices. No question regarding the personal liability of the Wilsons, the individual Defendants, was briefed, argued, reviewed, or referenced by the Fifth Circuit. Instead, the questions of personal liability of the Wilsons were reserved and raised to the Federal Circuit on appeal from the final decision entered by the District Court on August 30, 1982. Both parties presented arguments on the merits. No issue was raised concerning any possible application of the doctrine of law of the case. Without regard for the merits, the Federal Circuit, *sua sponte,* refused to resolve these issues on the basis that the Fifth Circuit's prior interlocutory appellate decision somehow affirmed the District Court's decision that the Wilsons should be personally liable for damages.

The Federal Circuit's refusal to decide the issue of personal liability of the Wilsons under the rubric of applying the law-of-the-case doctrine is contrary to the directives of this Court. As acknowledged by the Federal Circuit, the doctrine of law of the case applies only to matters actually decided in prior proceedings either expressly or by clear implication. *See Quern* v. *Jordan,* 440 U.S. 332, 347 n.18 (1979); *Messenger* v. *Anderson,* 225 U.S. 436, 444 (1912). To this must be added another axiom of Federal practice: the doctrine of law of the case does not preclude matters that could have been but were not decided during prior proceedings. 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction,* § 4478, at 788-89 (1981). As the Fifth Circuit has recently explained: "unlike common law res judicata, the law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided on the prior appeal." *Conway* v. *Chemical Leaman Tank Lines, Inc.,* 644 F.2d 1059, 1062 (5th Cir. 1981). These

principles are echoed in many cases. *Maggard* v. *O'Connell,* 703 F.2d 1284, 1289 (D.C. Cir. 1983); *Liberty Mutual Ins. Co.* v. *EEOC,* 691 F.2d 438, 441 (9th Cir. 1982); *Doran* v. *Petroleum Management Corp.,* 576 F.2d 91, 93 (5th Cir. 1978); *Connett* v. *City of Jerseyville,* 110 F.2d 1015, 1018 (7th Cir. 1940). In addition, as also explained by the Fifth Circuit, the "law of the case doctrine does not encompass issues presented for decision but left unanswered by the appellate court." *Pegues* v. *Morehouse Parish School Board,* 706 F.2d 735, 738 (5th Cir. 1983).

It is critical, then, to determine what issues were actually decided in order to define the "law" of a case. *Gertz* v. *Robert Welch, Inc.,* 680 F.2d 527, 533 (7th Cir. 1982). In determining what issues were decided by a previous appellate opinion, the focus is, as it must be, wholly on that prior opinion, bearing in mind the procedural posture of the case at that time. *Maggard* v. *O'Connell,* 703 F.2d 1284, 1289 (D.C. Cir. 1983). This requires "a careful reading" of that prior opinion, *Gertz, supra,* 680 F.2d at 533, since it is well settled that omissions, contentions of counsel not responded to, and observations or commentary on matters not before the court do not become part of the law of the case or constitute bases from which the law of the case may properly be inferred. *Hartford Life Insurance Co.* v. *Blincoe,* 255 U.S. 129, 136 (1921); *Connett* v. *City of Jerseyville,* 110 F.2d 1015, 1018 (7th Cir. 1940). *See, Washington Sportservice, Inc.* v. *M.J. Uline Co.,* 313 F.2d 889, 895-896 (D.C. Cir. 1962) (Bazelon, C.J., dissenting). The real question is simply: was the point now raised decided on the former appeal? *Chase* v. *United States,* 261 F. 833, 840 (8th Cir. 1919), *aff'd,* 256 U.S. 1 (1921).

Upon a careful reading of the Fifth Circuit's opinion in the present case, bearing in mind its procedural posture and in view of the foregoing principles of law governing this issue, it becomes

readily apparent that the Fifth Circuit did not decide the personal liability of corporate officers issue that *sua sponte* was refused consideration by the Federal Circuit. The fact that the Fifth Circuit did not decide the personal liability issue is clear from the following procedural facts:

(1) No arguments were made to the Fifth Circuit concerning personal liability of the individual defendants for inducing infringement. No statement concerning the liability of the individual Defendants appears in the Fifth Circuit opinion. No citation of the pivotal case of *Mead Johnson & Co.* v. *Baby's Formula Service, Inc.*, 402 F.2d 19 (5th Cir. 1968), relied upon by the District Court, appears in any brief or the Fifth Circuit opinion.

(2) Arguments concerning the liability of the Defendants — both corporate and individual — for willful infringement, increased damages, and attorney fees were made to the Fifth Circuit. However, in a letter order dated October 7, 1982, the Fifth Circuit *sua sponte* questioned whether the Fifth Circuit had jurisdiction and directed that the parties submit supplemental briefs addressing the question of "whether under the principles of such cases as *Holmes* v. *McDermott*, 682 F.2d 1143 (5th Cir. 1982), the judgment appealed from is final within the meaning of 28 U.S.C. § 1291(a)(4) given the interlocutory character of the appeal." (A.73). Under the *Holmes* case, questions of liability — as for example for attorney fees — are not final and reviewable until the amount of damages are ascertained. In response, Defendants advised the Fifth Circuit that the only questions to be presently considered were validity and infringement and that all other questions relating to the awards for damages and attorney fees would be reserved. Thereafter, the Fifth Circuit specifically noted that "the issue of damages . . . was severed" (708 F.2d at 154; A.79-80) and that the question of attorney fees was "waived . . . leaving that issue to be considered with the second phase of the bifurcated trial."

(708 F.2d at 154 n. 1; A.80). The only questions considered by the Fifth Circuit were validity (708 F.2d at 154-156; A.80-83) and infringement by "*Wilco's* marsh buggy" concluding that "*Wilco's* models infringe the Rivet patent". (708 F.2d at 156; A.84). (Emphasis added). No questions concerning willfulness, inducing infringement, exceptional case, or liability for pecuniary damages, attorney fees, or increased damages by the Wilsons, the individual Defendants, were considered.

(3) Certainly, the issue of personal liability of the individual Defendants was not expressly discussed by the Fifth Circuit. Because the questions of liability — both corporate and individual — for attorney fees and increased damages were expressly reserved, the personal liability of the individual Defendants for those damages were not ascertained either expressly or by necessary inference by the Fifth Circuit. Because the facts (Fact Findings 52-64; 561 F.Supp. at 518-19; A.39-41) underlying a determination of personal liability of the individual Defendants are the same for all issues of damages — pecuniary, increased, and attorney fees — it is clear that the only "necessary inference" is that none of these issues were considered or decided by the Fifth Circuit. As a matter of policy, the issues of liability — who is to pay — should naturally be considered along with the questions of damages — how much to pay. *See, Paeco, Inc.* v. *Applied Moldings, Inc.*, 562 F.2d 870, 878-80 (3rd Cir. 1977); *Saf-Gard Products, Inc.* v. *Service Parts, Inc.*, 532 F.2d 1266, 1273 (9th Cir. 1976). 16 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3928, at 132 (1977).

Accordingly, the Federal Circuit's *sua sponte* determination that the issue of personal liability of the Wilsons had been considered and decided by the Fifth Circuit is in error. As it did in the erroneous opinion in *Smith* underlying Petition No. 84-1995 to this Court, the Federal Circuit has applied the doctrine of law of the case to matters that could have been, but were not

decided, on the prior interlocutory appeal. But *res judicata* has no application to subsequent decisions in pending proceedings. The opinions in *Smith* and *Wilco* are dangerous precedents for a court of national authority to set. The 507 district judges bound under *stare decisis* by these decisions will be forced either to resolve conflicting procedural precedents as between the Federal Circuit and the respective regional circuit to which the district court also owes allegiance or to apply different principles of federal procedure depending upon the substantive issues presented. District judges should not be placed in such a quandary. Law of the case is a doctrine of general applicability that should be uniformly applied by all federal courts.

CONCLUSION

As in *Smith*, Petition No. 84-1995, the Federal Circuit has again misapplied the doctrine of law of the case. The Federal Circuit's opinions in this case and in *Smith* will be binding on each of this nation's 507 district judges. The instructions given those judges are contrary to the directives of this Court and will unnecessarily complicate the presentation of evidence and arguments in interlocutory proceedings. For all of the reasons set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and accurate copies of the Petition For a Writ of Certiorari To The United States Court of Appeal For the Federal Circuit and accompanying Appendix on behalf of Petitioners Wilco Marsh Buggies and Draglines, Inc. John M. Wilson, Sr., Dean R. Wilson, and Robert J. Wilson, Jr. were mailed to opposing counsel of record on this the ..... day of August, 1985.

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